Field. 21 — 7.60

Field
Submitted

Reversed

Bradley J.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~409~~. 1st 28

ELMORE B. CLINKENBEARD, MARMADUKE DODSWORTH, AND LOUIS SOHNGEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED AUGUST 26, 1872.

Carroll 7.60

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1 At a circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati, on the first Tuesday of April, being the second day of that month in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-sixth—present, the Honorable Philip B. Swing, one of the judges of said court—

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA
vs.
ELMORE B. CLINKENBEARD, MARMADUKE Dodsworth, and Louis Sohngen. } 1160. Debt.

Be it remembered, that heretofore, to wit, on the 15th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, came the plaintiff, by Durbin Ward, esq., its attorney, and sued out of the clerk's office of said court, the writ of summons ad respondendum against the defendants herein, which said writ is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The president of the United States of America, to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Elmore B. Clinkinbeard, Marmaduke Dodsworth, and Louis Sohngen, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio, aforesaid, at Cincinnati, on the fourth Tuesday in the month of April, 1869, to answer unto the United States of America of a plea of debt, $30,000; damages, $5,000; due in equity, $30,000; interest from Sept'r
2 11th, 1868.

And have you then and there this writ.

Witness, the Honorable Salmon P. Chase, Chief Justice of the United States, this 15th day of April, A. D. 1869, and in the 93d year of the Independence of the United States of America.

[SEAL.] JOHN McLEAN, *Clerk.*

Attest:

Upon which said writ is the following endorsement, to wit:

Cause of action.

Suit brought to recover thirty thousand dollars and interest thereon from the 11th of September, A. D. 1868, on a distillers' bond, executed by the defendants to the plaintiffs September 11th, 1868, for the faithful compliance in all respects with the requirements of the law in relation to distilled spirits, the condition of which is broken.

DURBIN WARD,
U. S. Attorney for Southern Dist. of O.

And afterwards, to wit, on the 21st day of April, in the year last aforesaid, came the said marshal, to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of said court, with his proceedings endorsed thereon, in the words and figures following, to wit:

Marshal's return to summons.

HAMILTON, *April 17th*, '69.

Served the within named Louis Songen, personally, by copy; Marmaduke Dodsworth, at residence. Elmore B. Clinkenbeard, not found.

A. HICKENLOOPER, JR.,
U. S. Marshal, S. D. O.
By J. H. LONG, *Dep't.*

CINCINNATI, *April 21st*, 1869.

Served the within-named Elmore B. Clinkenbeard, personally,
3 by copy, on the 20th day of April, A. D. 1869.

A. HICKENLOOPER,
U. S. Marshal.
By C. S. VAN SICKLEN *Deputy.*

And afterwards, to wit, on the 5th day of May, in the year last aforesaid, again came the plaintiff, by W. M. Bateman, esq., its attorney, and sued out of the clerk's office of said court, an alias writ of summons ad respondendum against E. B. Clinkenbeard, one of the defendants herein, which said writ is in the words and figures following, to wit:

Alias summons:

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon E. B. Clinkenbeard, Cumminsville, O., citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the third Tuesday in the month of May, 1869, to answer unto the United States of America, of a plea of debt, debt, $30,000; damages, $5,000; due in equity, $30,000; interest from Sept'r 11th, 1868.

And have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, this 5th day of May, A. D., 1869, and in the 93d year of the Independence of the United States of America.

Attest:
[SEAL.] JOHN McLEAN, *Clerk.*

Upon which said writ is the following endorsement, to wit:

Cause of action.

Suit brought to recover thirty thousand dollars and interest
4 thereon from the 11th of September, A. D. 1868, on a distiller's bond, executed by the defendants to the plaintiffs, September 11th,

1868, for the faithful compliance in all respects with the requirements of the law in relation to distilled spirits, the condition of which is broken.

WARNER M. BATEMAN,
U. S. Attorney for S. D. of Ohio.

And afterwards, to wit, on the 6th day of May, in the year last aforesaid, came the said marshal, to whom said writ was, in form aforesaid, directed, and returned the same into the clerk's office of said court, with his proceedings endorsed thereon, in the words and figures following, to wit:

M'l's return to alias summons.

CINCINNATI, *May* 6, 1869.

Served the within-named Elmore B. Clinkenbeard personally by copy this day.

A. HICKENLOOPER, *U. S. M.*
By C. S. VAN SICKLEN, *Deputy.*

And afterwards, to wit, on the 24th day of May, in the year last aforesaid, came the plaintiff, by Warner M. Bateman, esq., its attorney, and filed in the clerk's office of said court its declaration herein, which said declaration is in the words and figures following, to wit:

Declaration.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

In the circuit court of the United States within and for the sixth circuit and southern district of Ohio, of the term of April, A. D. 1869.

The United States of America, plaintiffs, complain of Elmore B. Clinkinbeard, Marmaduke Dodsworth, and Louis Sohngen, defendants, in a plea of debt, that they render unto the plaintiffs the sum of thirty thousand dollars, which they owe to, and unjustly detain from, the plaintiffs.

5 For that whereas, heretofore, to wit, on the eleventh day of September, A. D. 1868, in the district aforesaid, the defendants, by their certain writing-obligatory, of that date, sealed with their seals, and now to the court here shown, acknowledged themselves to be held and firmly bound unto the plaintiffs, in the sum of thirty thousand dollars, for the payment whereof they thereby bound themselves, their heirs, executors, and administrators, jointly and severally; and the said writing-obligatory was made with a condition thereunder written, that whereas the said Elmore B. Clinkinbeard intends to be engaged in the business of a distiller within the third collection district of the State of Ohio: Now, therefore, if the said Elmore B. Clinkenbeard shall, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus, to be encumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business, then this obligation shall be void;

otherwise it shall remain in full force. And although the said Elmore B. Clinkinbeard, at the time and place aforesaid, entered and engaged in the business of a distiller, yet the said Elmore B. Clinkinbeard, at and after the date of the said writing-obligatory, to wit, on the day and year last aforesaid, and at the districts aforesaid, did not comply, in all respects, well and truly with the requirements of the law in relation to distilled spirits, in this, to wit, that the said Elmore B. Clinkinbeard, distiller, as aforesaid, at the place aforesaid, distilled, and caused *and caused* to be produced a large quantity, to wit, nine thousand proof-gallons of spirits, for the month of October, A. D. 1868, which the
6 said Elmore B. Clinkinbeard has not accounted for in his return to the assessor of the district for the month aforesaid, and which said deficiency has been duly assessed, together with the special tax of four dollars for every cask of forty proof-gallons, as required by law, and which said deficiency is still due and unpaid, nor has the said Elmore B. Clinkinbeard, authorized distiller, as aforesaid, paid the tax, which has been duly assessed upon the aggregate capacity of the said distillery for making and fermenting grain for the month aforesaid, but, although often required by the plaintiffs, the said Elmore B. Clinkinbeard has wholly neglected and refused to comply with the conditions of his said obligation, contrary to the form of the statute of the United States of America, in such case made and provided, and of his writing-obligatory aforesaid, to the damage of the plaintiffs, thirty thousand dollars, whereby the said writing-obligatory has become forfeited to the plaintiffs, and an action hath accrued to them to have and demand of the said Elmore B. Clinkinbeard, Marmaduke Dodsworth, and Louis Sohngen, the said sum of thirty thousand dollars above demanded, and thereupon they bring this suit.

WARNER M. BATEMAN,
U. S. Attorney, S. D. O.

And afterwards, to wit, on the 8th day of June, in the year last aforesaid, came the defendants, by Robert Christy, esq., their attorney, and filed in the clerk's office of said court their pleas herein, which said pleas are in the words and figures following, to wit:

Pleas.

United States circuit court, southern district of Ohio.

THE UNITED STATES
vs.
ELMORE B. CLINKENBEARD, MARMADUKE Dodsworth, & Louis Songhen. } 1160. Pleas in debt.

7 And now come the said defendants and defend the wrong and injury when, &c., and say that said writing-obligatory is not their deed, and of this they put themselves upon the country. And the plaintiff doth the like.

And for a further plea they say that they ought not to be charged with the said debt, by virtue of the said writing-obligatory, because they say that said Elmore B. Clinkenbeard, at all times since the making of the same and the condition thereof, has truly kept and performed all and singular the articles, clauses, conditions, & requirements in said condition of said writing-obligatory mentioned, according to the true intent and meaning thereof, and this they are ready to verify. Where-

fore they pray judgment if they ought to be charged with said debt by reason of said supposed writing-obligatory.

ROBERT CHRISTY,
Att'y for Defendants.

And afterwards, to wit, on the 5th day of October, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Leave to file replication.

THE UNITED STATES
vs.
E. B. CLINKENBEARD ET AL. } 1160. Debt.

On motion, it is ordered that the default herein be and the same is hereby set aside, and plaintiffs have leave to file their replication herein forthwith; and the same is accordingly filed.

And which said replication is in the words and figures following, to wit:

Replication.

THE UNITED STATES
vs.
ELMORE B. CLINKENBEARD. } 1160. U. S. cir. court.

8 And now comes the district att'y, on the part of the plaintiffs, and as to the first plea of the defendants above pleaded, and whereof they have put themselves upon the country, doth the like.

And for a replication to the second plea of the said defendants above pleaded, the plaintiffs, by the dist. att'y, say that by reason of anything in the said second plea alleged, they ought not to be barred from having and maintaining their aforesaid action against the said defendants because it is not true that the said Elmore B. Clinkenbeard at all times since the making of the said writing-obligatory, and the conditions thereof, has truly kept and performed all and singular the articles, clauses, conditions, and agreements in said condition of said writing-obligatory mentioned, according to the true intent and meaning thereof, and of this they put themselves upon the country. And the defendants do the like.

WARNER M. BATEMAN, *U. S. Att'y.*

And afterwards, to wit, on the 21st day of June, in the year of our Lord one thousand eight hundred and seventy, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Continuance.

THE UNITED STATES
vs.
E. B. CLINKENBEARD ET AL. } 1160. Debt.

On application of defendants' counsel, and by consent of both parties, it is ordered by the court that the above case be and is hereby continued, at the costs of said defendants, for this term.

And afterwards, to wit, on the 17th day of April, in the year of our Lord one thousand eight hundred and seventy-one, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Jury sworn.

THE UNITED STATES
vs.
ELMORE B. CLINKENBEARD, MARMADUKE Dodsworth, and Louis Sohngen. } 1160. Debt.

This day came the parties, by their attorneys, and thereupon came a jury, to wit, Humphrey Fullerton, James Crane, James Stephenson, James T. Fisher, John James, William A. Swihart, George H. Davenport, David Firestone, William Mitchell, Ansel Northup, Gavin M. Boyd, and Lemuel Rush, who were duly empaneled and sworn well and truly to try the issue joined between the parties; and, the evidence not being finished, the court adjourned the jury until to-morrow morning, at half-past nine o'clock, to which time this case is continued.

And afterwards, and during the progress of the trial of said case, to wit, on the 19th day of April, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Leave to amend declaration.

THE UNITED STATES
vs.
E. B. CLINKENBEARD. } 1160. Debt.

On motion of the district attorney, it is ordered that plaintiff have leave to amend the declaration in this case, by inserting after the words in the declaration "caused to be produced a large quantity, to wit," the words "thirty-eight thousand nine hundred and one," and after the words and figures in said declaration "October, A. D. 1868," the words "of which said thirty-eight thousand nine hundred and one gallons, seven thousand nine hundred and seventy-seven gallons was a deficiency for said month;" and after the words in the declaration "forty proof-gallons," the words "of said thirty-eight thousand nine hundred and one proof-gallons." And said declaration is accordingly so amended.

And which said declaration, as amended and refiled, is in the words and figures following, to wit:

Amended declaration.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

In the circuit court of the United States within and for the sixth circuit and southern district of Ohio, of the term of April, A. D. 1869.

The United States of America, plaintiffs, complain of Elmore B. Clinkinbeard, Marmaduke Dodsworth, and Louis Sohngen, defendants

in a plea of debt, that they render unto the plaintiffs the sum of thirty thousand dollars, which they owe to and unjustly detain from the plaintiffs.

For that whereas heretofore, to wit, on the eleventh day of September, A. D. 1868, in the district aforesaid, the defendants, by their certain writing-obligatory of that date, sealed with their seals, and now to the court here shown, acknowledged themselves to be held and firmly bound unto the plaintiffs in the sum of thirty thousand dollars, for the payment whereof they thereby bound themselves, their heirs, executors, and administrators, jointly and severally; and the said writing-obligatory was made with a condition thereunder written, that whereas the said Elmore B. Clinkinbeard intends to be engaged in the business of a distiller within the third collection district of the State of Ohio:

11 Now therefore, if the said Elmore B. Clinkenbeard shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus, to be incumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business, then this obligation shall be void, otherwise it shall remain in full force. And although the said Elmore B. Clinkinbeard, at the time and place aforesaid, entered and engaged in the business of a distiller, yet the said Elmore B. Clinkinbeard, at and after the date of the said writing-obligatory, to wit, on the day and year last aforesaid, and at the districts aforesaid, did not comply in all respects well and truly with the requirements of the law in relation to distilled spirits, in this, to wit, that the said Elmore B. Clinkinbeard, distiller as aforesaid, at the place aforesaid, distilled and caused *and caused* to be produced a large quantity, to wit, thirty-eight thousand, nine hundred and one, *nine thousand* proof-gallons of spirits, for the month of October, A. D. 1868, of which said thirty-eight thousand nine hundred and one gallons, seven thousand nine hundred and seventy-seven gallons was a deficiency for said month, which the said Elmore B. Clinkinbeard has not accounted for in his return to the assessor of the district for the month aforesaid, and which said deficiency has been duly assessed, together with the special tax of four dollars for every cask of forty proof-gallons of said thirty-eight thousand nine hundred and one proof-gallons, as required by law, and which said deficiency is still due and unpaid; nor has the said Elmore B.

12 Clinkinbeard, authorized distiller as aforesaid, paid the tax which has been duly assessed upon the aggregate capacity of the said distillery for making and fermenting grain for the month aforesaid, but, although often required by the plaintiffs, the said Elmore B. Clinkinbeard has wholly neglected and refused to comply with the conditions of his said obligation, contrary to the form of the statute of the United States of America in such case made and provided, and of his writing-obligatory aforesaid, to the damage of the plaintiffs thirty thousand dollars, whereby the said writing-obligatory has become forfeited to the plaintiffs, and an action hath accrued to them to have and demand of the said Elmore B. Clinkinbeard, Marmaduke Dodsworth, and Louis Sohngen, the said sum of thirty thousand dollars above demanded, and thereupon they bring this suit.

WARNER M. BATEMAN,
U. S. Attorney, S. D. O.

And afterwards, to wit, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Verdict and judgment.

THE UNITED STATES
vs.
ELMORE B. CLINKENBEARD, MARMADUKE Dodsworth, and Louis Sohngen. } 1160. Debt.

This day again came the parties, by their attorneys, and also the jurors beretofore empaneled and sworn herein, and having heard the evidence, the arguments of counsel, and the charge of the court, upon their oaths do find that the bond in the declaration mentioned and set forth is the deed of the said Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen, and that said defendants do owe to the plaintiff the sum of thirty thousand dollars, its debt aforesaid, as is in the said declaration alleged. And they do further find that
13 plaintiff hath sustained damages, by reason of the breaches of the said writing-obligatory, to the sum of four thousand dollars.

It is therefore considered that plaintiff recover of the said defendants its debt aforesaid, and have execution for the said sum of four thousand dollars, its said damages, and also for the sum of $ costs herein expended. And thereupon, the said defendants, by their attorneys, give notice of a motion for a new trial.

And afterwards, to wit: on the 20th day of April, in the year last aforesaid, came the defendants by Messrs. Hoadly, Jackson and Johnson and Robert Christy their attorneys and filed in the clerk's office of said court their motion for a new trial herein, which said motion is in the words and figures following, to wit:

Motion for new trial.

The United States circuit court, southern district of Ohio.

THE UNITED STATES
vs.
E. B. CLINKENBEARD ET. AL. } 1160. Motion for a new trial.

And now come the said defendant and move the court to set aside the judgment and verdict, and to grant a new trial herein, for the reasons followlng, to wit:

1st. The verdict & judgment are against the law of the case.

2d. The verdict is against the weight of evidence.

3d. The court erred in its charge as to the law given to the jury that tried the case.

4th. The court erred in refusing to give the special instructions asked for by the attorneys for said defendants.

5th. The court erred in withholding competent & relevant testimony offered by said defendants on the trial of said cause, from said jury.

6th. By reason of newly discovered testimony that said defendants could not by reasonable diligence have procured in time to offer
14 it upon the trial of said cause, said newly descovered testimony being competent & relevant & material, and not cumulative.

7th. Because of other errors occurring upon said trial, and the existence of other sufficient reasons.

8th. Because said verdict & judgment were for said plaintiff, whereas they should, by the laws of the land, have been rendered for said defendants.

ROBERT CHRISTY &
HOADLY, JACKSON & JOHNSON,
Att'ys for def'ts.

And afterwards, to wit, on the 18th day of July in the year last aforesaid an entry was made upon the journal of said court, in said case in the words and figures, following, to wit:

Continuance of motion for new trial.

THE UNITED STATES
vs.
E. B. CLINKENBEARD, ET. AL. } 1160. Debt. On motion for new trial.

This day this cause came on to be further heard upon said motion. Whereupon it is ordered by the court that said cause be continued until the next term of this court; and that the issuing of execution herein be also suspended until the next term of this court.

And afterwards, to wit, on the 22d day of June, in the year of our Lord one thousand eight hundred and seventy-two, an entry was made upon the journal of said court in said case in the words and figures following, to wit:

Judgment set aside.

THE UNITED STATES
vs.
ELMORE B. CLINKENBEARD. } 1160. Debt.

And now this cause coming on to be heard upon the motion heretofore filed herein by defendants for a new trial, *and* was argued by counsel and submitted; and the court on consideration thereof and being fully advised in the premises do sustain said motion. Wherefore it is considered and ordered by the court that the verdict heretofore entered herein be set aside and held for naught, and a new trial granted.

And afterwards, to wit, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court in said case, in the words and figures following, to wit:

Judgment.

THE UNITED STATES
vs.
ELMORE B. CLINKENBEARD, LOUIS SOHNGEN and Marmaduke Dodsworth. } 1160. Debt.

And now this cause coming on to be heard upon the pleadings and evidence, the intervention of a jury being waived in writing by the parties hereto, and the premises being submitted to the Honorable Philip B.

Swing, district judge sitting as circuit judge, there being no judge of the circuit or Supreme Court of the United States present, the court being fully advised in the premises doth find that the bond in the declaration sued on is the deed of the defendants, and that there is due to plaintiffs from defendants by reason of the breaches assigned in the declaration, the sum of four thousand dollars with interest thereon from the second day of April, 1872; to which said finding said defendants and each of them severally excepted; and thereupon defendants tendered their bill of exceptions, which is signed, sealed, allowed, and ordered to be made part of the record. Whereupon defendants moved for a new trial and to set aside the finding aforesaid, which said motion the court overruled; to the overruling of which defendants and each of them severally
16 excepted. Wherefore it is considered by the court that plaintiff recover of defendants the sum of four thousand dollars with interest thereon from the 2d day of April, 1872, and its costs herein expended, taxed at $, for which execution is hereby awarded; to all of which said defendants and each of them severally except.

And afterwards, to wit, but on the same day and in the year last aforesaid, there was filed in the clerk's office of said court a certain bill of exceptions herein, which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, southern district of Ohio.

THE UNITED STATES *vs.* ELMORE B. CLINKENBEARD, LOUIS SOHNGEN. } No. 1160. Bill of exceptions.

Be it remembered that this cause coming on to be heard at the April term, A. D. 1872, of said court, before the Honorable P. B. Swing, there being no other judge present, the intervention of a jury by consent of all parties being expressly waived in writing; and the premises being submitted to the court on the issues joined, the plaintiff as tending to sustain the issues upon its part, gave in evidence testimony, showing that on the day of Nov. 1868, Geo. B. Johnson, assessor of the third district of Ohio, made an assessment upon the defendant, E. B. Clinkenbeard as a distiller, for an alleged deficiency during the month of October, 1868; that said amount was duly transmitted to the collector of said district and demand made for the same, but that it has not been paid.

Whereupon defendants offered in evidence, the distillers, tri-
17 monthly returns and accounts of said E. B. Clinkenbeard, marked, Exibits A, B, C, & D, hereto attached and made a part of this bill of exceptions.

And the defendants also offered in evidence the following letters, marked E, F, G, H, & I, hereto attached and made part of this bill of exceptions; that said defendants laid the foundation for the introduction of said papers and exhibits, all and singular, by calling the assessor of said collection district and after the said assessor was duly sworn according to law, said defendants offered to prove that each and all of said papers and exhibits were regularly received by him as such assessor of said third collection district, and were regularly filed amongst his official papers and have remained on file in his office as such assessor, until he

had brought them into said court to be offered as evidence upon the trial of this cause.

Whereupon the counsel for said plaintiff interposed and insisted that the evidence so offered by said defendants, as aforesaid, was not good or admissable in law upon the issue aforesaid, and then and there moved the said court to arrest the same from the consideration of the jury; and the said judge of said court then & there held & affirmed that said evidence so offered by the said defendants was not good nor admissable in law upon the issue aforesaid, and thereupon granted the said motion of the said plaintiffs in that behalf and refused to admit said evidence so offered, as aforesaid, by the said defendants; to the granting of which said motion and the refusal to admit the testimony aforesaid, defendants then and there excepted.

And said defendants also offered to prove by said assessor, that for the first four days for which taxes were assessed against said distiller by said assessment, said Clinkenbeard was unable to operate said distillery, because no store-keeper had been assigned by the Govern-
18 ment to said distillery, and that for four other days, to wit, from the 8th until the 12th day of October, said defendant, Clinkenbeard, had by reason of an unavoidable accident been unable to operate said distillery; that said Clinkenbeard had given the notice required by law of said accident, and that the machinery of said distillery during said time was securely fastened by an assistant assessor and so remained fastened as required by law; and that said four days, whilst said Clinkenbeard, by reason of said accident, was unable to work and operate said distillery, are included in said assessment so as aforesaid made; to which said testimony and offer to prove the same, plaintiff objected and the court sustained said objection and refused to admit said testimony so as aforesaid offered; to the sustaining of said objection and the refusal to admit said testimony, said defendants excepted.

Whereupon defendants tendered this their bill of exceptions, and prayed that the same might be signed, sealed, allowed, and made part of the record, which is done accordingly.

PHILIP B. SWING,
Judge Dist. Court of United States for the Southern Dist. of Ohio,
Sitting as Circuit Judge.

Exhibit A to bill of exceptions.

Exhibit A to bill of exceptions.

(14.) United States internal revenue. Distillers' tri-monthly account. To be rendered to the assessor or assistant assessor, in duplicate, on the first, eleventh, and twenty-first days of each month, or within five days thereafter. Act July 20, 1868, sec. 19.)

19 *Account of the quantity and kind of materials used for the production of spirits at the distillery carried on by E. B. Clinkenbeard, distiller, in the city of Hamilton, county of Butler, and State of Ohio, and the quantity of spirits distilled and placed in warehouse by him, during the period commencing the 1st day of October, and ending the 10th day of October, 1868, both days inclusive.*

Date.	Quantities of grain or other materials put into mash-tub, or otherwise used.					Spirits distilled and placed in warehouse.		
	Malt. Bushels.	Rye. Bushels.	Corn. Bushels.	Mill-feed. Bushels.	Total. Bushels.	Barrels.	Wine-gallons.	Proof-gallons.
Oct. 1	18	6	504	72	600	.....	.....	.....
" 2	18	6	504	72	600	.....	.....	.....
" 3	18	6	504	72	600	.....	.....	.....
" 4	.....	.....	.....	.....	.....	.....	.....	.....
" 5	24	6	480	90	600	.....	.....	.....
" 6	24	6	480	90	600	.....	.....	.....
" 7	.....	.....	.....	.....	.....	.....	.....	.....
" 8	.....	.....	.....	.....	.....	.....	.....	.....
" 9	.....	.....	.....	.....	.....	.....	.....	.....
" 10	.....	.....	.....	.....	.....	41	1,748	2,002
	102	30	2,472	396	3,000	41	1,748	2,002

(Signed) E. B. CLINKENBEARD.

☞ The following oath should be taken by the distiller, or principal manager of the distillery:

I, E. B. Clinkenbeard, distiller, of the distillery at Hamilton, do solemnly swear, that since the date of the last return of the business of said distillery, dated 1st day of October to 10th day of October, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine-gallons and proof-gallons of spirits, and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials, respectively, hereinbefore specified, and no more.

20 (Signed) E. B. CLINKENBEARD.

Sworn and subscribed before me, this 14 day of October, 1868.

(Signed) SAMUEL SHAFFER,
Ass't Ass'r 4th Div., 3d Dist. of Ohio.

(Upon the back of which said exhibit are the following endorsements, to wit:)

14. Distillers' tri-monthly account. E. B. Clinkenbeard, distiller. Samuel Shaffer, assistant assessor, 3d district, 4th division. Oct. 1–10, 1868.

ASSESSOR'S OFFICE, 3D DIST. OF OHIO,
Lebanon, Ap'l 25, 1871.

I hereby certify that the within is a true copy of the original form 14, now on file in my office.

GEO. B. JOHNSON,
Assessor 3d Dist. Ohio.

Exhibit B to bill of exceptions.

Exhibit B to bill of exceptions.

14.) United States internal revenue. Distillers' tri-monthly account. (To be rendered to the assessor or assistant assessor, in duplicate, on the first, eleventh, and twenty-first days of each month, or within five days thereafter. Act July 20, 1868, sec. 19.)

Account of the quantity and kind of materials used for the production of spirits at the distillery carried on by E. B. Clinkenbeard, distiller, in the city of Hamilton, county of Butler, and State of Ohio, and the quantity of spirits distilled and placed in warehouse by him, during the period commencing the 11th day of October and ending the 20th day of October, 1868, both days inclusive.

21 Date.	Quantities of grain or other materials put into mash-tub, or otherwise used.					Spirits distilled and placed in warehouse.		
	Malt. Bushels.	Rye. Bushels.	Corn. Bushels.	Mill.feed. Bushels.	Total. Bushels.	Barrels.	Wine-gallons.	Proof-gallons.
Oct. 11								
" 12	24	6	480	90	600			
" 13	24	6	480	90	600	39	1,160	2,210
" 14	24	6	480	90	600			
" 15	24	6	480	90	600			
" 16	24	6	480	90	600	78	3,325	4,573
" 17	24	6	480	90	600			
" 18								
" 19	24	6	480	90	600	50	2,076	2,822
" 20	24	6	480	90	600			
	192	48	3,840	720	4,800	167	7,061	9,605

(Signed) E. B. CLINKENBEARD.

☞ The following oath should be taken by the distiller or principal manager of the distillery:

I, E. B. Clinkenbeard, distiller, of the distillery at Hamilton, do solemnly swear, that since the date of the last return of the business of said distillery, dated 11th day of October to 20th day of October, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine-gallons, and proof-gallons of spirits; and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials, respectively, hereinbefore specified, and no more.

(Signed) E. B. CLINKENBEARD.

Sworn and subscribed before me, this 22 day of October, 1868.

(Signed) SAMUEL SHAFFER,
Ass't Assessor 4 Div., 3d Dist. of Ohio.

22 (Upon the back of which said exhibit are the following endorsements, to wit:)

(14.) Distillers' tri-monthly account. E. B. Clinkenbeard, distiller. Samuel Shaffer, assistant assessor, 3d district, 4th division. Oct. 11–20, 1868.

ASSESSOR'S OFFICE, 3D DIST. OHIO,
Lebanon, Ap'l 25, 1871.

I hereby certify that the within is a true copy of the original form 14, now on file in my office.

GEO. B. JOHNSON,
Assessor 3d Dist. Ohio.

Exhibit C to bill of exceptions.

Exhibit C to bill of exceptions.

(14.) United States internal revenue. Distillers' tri-monthly account. (To be rendered to the assessor or assistant assor, in duplicate, on the first, eleventh, and twenty-first days of each month, or within five days thereafter. Act July 20, 1868, sec. 19.)

Account of the quantity and kind of materials used for the production of spirits at the distillery carried on by E. B. Clinkenbeard, distiller, in the city of Hamilton, county of Butler, and State of Ohio, and the quantity of spirits distilled and placed in warehouse by him, during the period commencing the 21st day of October, and ending the 31st day of October, 1868, both days inclusive.

23 Date.	Quantities of grain or other materials put into mash-tub, or otherwise used.										Spirits distilled and placed in ware house.		
	Malt.		Rye.		Corn.		Mill-feed.		Total.				
	Bushels.	Pounds.	Bushels.	Pounds.	Bushels.	Pounds.	Bushels.	Pounds.	Bushels.	Pounds.	Barrels.	Wine-gallons.	Proof-gallons.
Oct. 21	24	1,344	6	336	480	26,880	90	5,040	600	33,600	.....	.....	.....
" 22	24	1,344	6	336	480	26,880	90	5,040	600	33,600	75	3,112	4,160
" 23	24	1,344	6	336	480	26,880	90	5,040	600	33,600	.....	.....	.....
" 24	24	1,344	6	336	480	26,880	90	5,040	600	33,600	.....	.....	.....
" 25*	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
" 26	18	1,008	6	336	480	26,880	96	5,376	600	33,600	.....	.....	.....
" 27	18	1,008	6	336	480	26,880	96	5,376	600	33,600	100	4,296	5,794
" 28	18	1,008	6	336	480	26,880	96	5,376	600	33,600	.....	.....	.....
" 29	18	1,008	6	336	480	26,880	96	5,376	600	33,600	100	4,395	6,063
" 31	18	1,008	6	336	480	26,880	96	5,376	600	33,600	.....	.....	.....
" 31	18	1,008	6	336	480	26,880	96	5,376	600	33,600	56	2,474	3,300
	204	11,424	60	3,360	4,800	268,800	936	52,416	6,000	336,000	331	14,277	19,317

* Sunday.

(Signed) E. B. CLINKENBEARD.

☞The following oath should be taken by the distiller or principal manager of the distillery:

I, E. B. Clinkenbeard, distiller, of the distillery at Hamilton, do solemnly swear that since the date of the last return of the business of said distillery, dated 21st day of October to 31st day of October, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine-gallons and proof-gallons of spirits, and there were actually mashed and used in said distillery and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials, respectively, hereinbefore specified, and no more.

(Signed) E. B. CLINKENBEARD.

Sworn and subscribed before me this 4th day of November, 1868.

(Signed) SAMUEL SHAFFER,
Ass't Assessor, 4 Div. 3d Dist. of Ohio.

24 Upon the back of which exhibit are the following endorsements, to wit: (14.) Distillers' tri-monthly account. E. B. Clinkenbeard, distiller. Samuel Shaffer, assistant assessor, 3d district, 4 division. Oct. 21–31, 1868.

ASSESSOR'S OFFICE, 3D DIST. OHIO,
Lebanon, Ap'l 25, 1871.

I hereby certify that the within is a true copy of the original form 14, now on file in my office.

GEO. B. JOHNSON,
Assessor 3d Dist. Ohio.

Exhibit D to bill of exceptions.

Exhibit D to bill of exceptions.

(14.) United States internal revenue. Distiller's tri-monthly account. (To be rendered to the assessor or assistant assessor, in duplicate, on the first, eleventh, and twenty-first days of each month, or within five days thereafter. Act July 20, 1868, sec. 19.)

Account of the quantity and kind of materials used for the production of spirits at the distillery carried on by William J. Dodsworth, distiller, in the city of Hamilton, county of Butler, and State of Ohio, and the quantity of spirits distilled and placed in warehouse by him, during the period commencing the 27th day of January, and ending the 31st day of January, 1869, *both days inclusive.*

Date.	Quantities of grain or other materials put into mash-tub, or otherwise used.										Spirits distilled and placed in warehouse.		
	Malt.		Rye.		Corn.		Mill-feed.		Total.				
	Bushels.	Pounds.	Bushels.	Pounds.	Bushels.	Pounds.	Bushels.	Pounds.	Bushels.	Pounds.	Barrels.	Wine-gallons.	Proof-gallons.
Jan. 27	6	336	2	112	160	8,960	32	1,792	260	11,200	.....	.....	.....
" 28	24	1,344	8	448	540	30,240	68	3,808	640	35,840	.....	.....	.....
" 29	18	1,008	6	336	360	20,160	36	2,016	420	23,520	.....	.....	.....
" 30	18	1,008	6	336	360	20,160	36	2,016	420	23,520	20	879½	1,276
" 31*	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
25	66	3,696	22	1,232	1,420	79 520	172	9,632	1,680	94,080	20	879½	1,276

*Sunday; distillery did not run on this day.
This distillery was formerly operated by E. B. Clinkenbeard.

SAM'L SHAFFER, *Ass't Ass'r.*

(Signed) WILLIAM I. DODSWORTH.

☞The following oath should be taken by the distiller or principal manager of the distillery.

I, William I. Dodsworth, distiller, of the distillery at Hamilton, do solemnly swear that since the date of the last return of the business of said distillery, dated 27th day of January to 31st day of January, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine-gallons and proof-gallons of spirits, and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of

grain, sugar, molasses, and other materials respectively, hereinbefore specified, and no more.

(Signed) WILLIAM I. DODSWORTH.

Sworn and subscribed before me this 3d day of February, 1869.

(Signed) SAMUEL SHAFFER,
Ass't Assessor 3d dist. of Ohio.

Upon the back of which exhibit are the following endorsements, to wit:

(14) Distillers' tri-monthly account. William I. Dodsworth, distiller. Samuel Shaffer, assistant-assessor 3d district Ohio, 3d division. January 27–31, 1869.

ASSESSOR'S OFFICE, 3D DIST. OHIO,
Lebanon, Ap'l 25th, 1871.

I hereby certify that the within is a true copy of the original form 14, now on file in my office.

26 GEO. B. JOHNSON,
Assessor 3 Dist. O.

Exhibit E to bill of exceptions.

HAMILTON, *October* 8, 1868.

Mr. SAMUEL SHAFFER, *Ass't Assessor.*

DEAR SIR: I wish to suspend work on this day, 8 October. You will therefore proceed to lock furnace, &c., as required by law. The reason for stopping is the giving way of still.

Respectfully, &c.,

E. B. CLINKENBEARD.

Exhibit F to bill of exceptions.

ASSESSOR'S OFFICE, 3D DIST. OHIO,
Lebanon, April 25th, 1871.

I hereby certify that the foregoing is a true copy of the original notice, now on file in my office.

GEO. B. JOHNSON,
Assessor 3d Dist. O.

Exhibit G to bill of exceptions.

HAMILTON, O., *October 10th*, 1868.

Mr. SAMUEL SHAFFER, *Ass't Ass'r:*

I hereby notify you that I wish to start the distillery on Monday, 12th inst., and you will oblige by removing locks, &c.

Respectfully, &c.,

E. B. CLINKENBEARD.

Exhibit H to bill of exceptions.

HAMILTON, *Oct. 12th*, 1868.

O. C. MAXWELL, *Assessor.*

27 SIR: Having received the above notice, I proceeded to the distillery of E. B. Clinkenbeard this a. m., at 7 o'clock, and removed

the locks and fastenings from the boilers and furnaces, and they commenced to work said distillery this morning.

Yours,

SAMUEL SHAFFER, *Ass't Ass'r.*

ASSESSOR'S OFFICE, 3D DIST. OHIO,
Lebanon, April 25th, 1871.

I hereby certify that the foregoing are true copies of the original notice of the distiller and the report of the ass't assessor, now on file in my office.

GEO. B. JOHNSON,
Assessor 3d Dist. O.

Exhibit I to bill of exceptions.

HAMILTON, *October 8th*, 1868.

Gen'l O. C. MAXWELL, *Assessor.*

SIR: At four o'clock p. m. of the above date, I received a notice from E. B. Clinkenbeard, distiller of division No. 4, dist. No. 3, Ohio, informing me that he wished to suspend work this day.

After the receipt of the said notice I proceeded to said distillery and securely fastened the bars across the furnace, boilers, &c., to prevent them from making fire under them, with lock and keys procured for that purpose. There was mash and beer on hand. Notice received herewith forwarded.

Yours, respectively,

SAMUEL SHAFFER, *Ass't Ass'r.*

28 ASSESSOR'S OFFICE, 3D DIST., OHIO,
Lebanon, Ap'l 25th, 1871.

I hereby certify that the foregoing is a true copy of the original report of the ass't ass'r, now on file in my office.

GEO. B. JOHNSON,
Assessor 3d Dist. Ohio.

And afterwards, to wit, on the 22d day of July, in the year last aforesaid, came the defendants and filed in the clerk's office of said court their error-bond herein, which said bond is in the words and figures following, to wit:

Error-bond.

Know all men by these presents, that we, Elmore B. Clinkenbeard, of Cumminsville, Hamilton County, Ohio, and Marmaduke Dodsworth and Louis Sohngen of Hamilton, Butler County, Ohio, principals, and Moses W. Gray, of Hamilton County, Ohio, surety, are held and firmly bound unto the United States of America, in the penal sum of eight thousand dollars, to the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 22d day of July, A. D. 1872.

The condition of the above obligation is such that, whereas the said Elmore B. Clinkenbeard et al., principals, have obtained an allowance of a writ of error upon a certain judgment rendered in the circuit court of the United States within and for the southern district of Ohio, in

favor of the said United States and against said Elmore B. Clinkenbeard et als.

Now, if the said Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen, shall pay the condemnation-money and costs
29 in case the said judgment of the said circuit court shall be affirmed by the Supreme Court of the United States, in whole or in part, then the above obligation shall be void; otherwise in full force and effect.

ELMORE B. CLINKENBEARD. [SEAL.]
MARMADUKE DODSWORTH. [SEAL.]
LOUIS SOHNGEN. [SEAL.]
MOSES W. GRAY. [SEAL.]

Signed & sealed in presence of us—
RICHARD C. ROHNER.
DENNIS TROY.

30 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States within and for said district, hereby certify the foregoing transcript to be truly taken and copied from the files and record of said court, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 22d day of July, A. D. 1872, and in the 97th year of the Independence of the United States of America.

Attest:
[SEAL.] THOMAS AMBROSE,
Clerk Cir. Court U. S., S. Dist. Ohio.

31 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment, in a plea which is in the said circuit court before you, between the United States of America, plaintiff, and Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and procoedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighth day of July in the year of our Lord one thousand eight hundred and seventy-two and of the Independence of the United States of America the 97th.

Attest:
[SEAL.] THOMAS AMBROSE, *Clerk.*

32 THE UNITED STATES OF AMERICA:

Supreme Court of the United States to the United States of America, greeting:

Whereas, Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen have obtained the allowance of our writ of error to the circuit court of the United States within and for the southern district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, proceedings, and judgment in an action of debt, wherein you, the said the United States of America, in that action lately recovered against the said Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen, a judgment for four thousand dollars and costs, as by the said record in the said circuit court remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen, we are informed, and our said writ of error granted, issued and allowed, as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be. You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

33 Witness the Honorable Salmon P. Chase, Chief Justice of the United States of America, this 8th day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 97th.

[SEAL.]

PHILIP B. SWING,
One of the Judges of the Circuit Court of the United States for the Southern District of Ohio.

I hereby acknowledge service of the foregoing citation for the United States of America, the defendant in error.

Cincinnati, July 22d, 1872.

WARNER M. BATEMAN,
Attorney for Defendant in Error.

(Indorsement on cover:) No. 409. Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen, plaintiffs in error, vs. The United States of America. S. Ohio C. C. U. S. Filed 26th August, 1872.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cin., O. Jan. 1874.

Supreme Court of the United States.

DECEMBER TERM, 1873.

Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen,
Plaintiffs in Error.

vs.

The United States,
Defendant in Error.

Error to Circuit Court, Southern District of Ohio.

Brief for Plaintiffs in Error
by
HOADLY & JOHNSON.

Robert Clarke & Co., Printers, 65 West Fourth Street, Cin., O. *Jan. 1874.*

Supreme Court of the United States.

Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen,
Plaintiffs in Error,

vs.

The United States,
Defendant in Error.

Error to the Circuit Court for the Southern District of Ohio.

Brief for Plaintiffs in Error,
by
HOADLY & JOHNSON.

STATEMENT OF THE CASE.

This is a writ of error prosecuted to reverse a judgment rendered at the April term, 1872 (Record, p. 9), in favor of the United States of America, plaintiff below, and against Elmore B. Clinkenbeard, Louis Sohngen, and Marmaduke Dodsworth, defendants below, in a plea of debt, for the sum of $4,000, with interest thereon from the 2d day of April, 1872.

The action was debt brought against plaintiffs in error on a certain writing obligatory, dated and sealed the 11th day of September, 1868, by plaintiffs in error, by which they acknowledged themselves indebted to the United States in the sum of $30,000. The condition thereunder written was that, whereas Elmore B. Clinkenbeard intended to engage in the business of a distiller within the Third Collection District of the State of Ohio, if the said Clinkenbeard should in all respects comply with the provisions of the law in relation to the duties and business of distillers, and pay all penalties named or fines imposed upon him for the violation of any of such provisions, and should not suffer the lot or tract of land on which his distillery stood, or any part thereof, or any of the distillery apparatus, to be incumbered during the time which he carried on business as a distiller, then the writing obligatory was to be void. (Record, p. 6.)

The breaches assigned by the declaration as amended (Record, p. 7), are, that said Elmore B. Clinkenbeard did not comply with the said writing obligatory in this, that he distilled and caused to be distilled for the month of October, 1868, 38,901 proof gallons of spirits for the said month, of which 7,977 gallons was a deficiency for said month, which said

Clinkenbeard had not accounted for in his return to the assessor, which said deficiency had been duly assessed, together with the special tax of four dollars for every cask of forty proof gallons as required by law; and also that said Clinkenbeard had not paid the tax which had been duly assessed upon the aggregate capacity of his distillery.

By way of defense, the defendants below plead *non est factum* and performance (Record, p. 4), to which said pleas the United States filed a formal replication. (Record, p. 5.)

The cause having been tried to a jury, a verdict was rendered for the United States for the sum of $4,000 (Record, p. 8), but upon motion and for good cause shown (Record, p. 9), this verdict was set aside and a new trial granted.

Coming on again to be heard, the intervention of a jury being waived and the premises being submitted to the Hon. P. B. Swing, District Judge, sitting as judge of Circuit Court, a similar ~~verdict and~~ judgment was ~~found~~ recovered against defendants, from which said judgment this writ of error is prosecuted.

The bill of exceptions (Record, p. 10) discloses that the plaintiff below relied entirely upon an assessment made in November, 1868, by George B. John-

son, assessor of the district, upon Clinkenbeard for an alleged deficiency for the month of October preceding; that said assessment was duly transmitted to the collector, and payment demanded and refused.

Defendants below offered in evidence certain trimonthly returns of said Clinkenbeard as distiller (marked A, B, C, and D); but upon objection of plaintiff, the same were ruled out by the Court, to which defendants excepted.

The object in so offering said returns was to show the exact amount of spirits produced during the month of October by Clinkenbeard, and thus to exhibit the fact that tax had been paid on all spirits actually manufactured, defendants hoping thus to avail themselves of the point that capacity tax was unconstitutional, and that Clinkenbeard having paid tax on all spirits actually produced, had fulfilled the conditions of the bond.

But, as since the hearing of the case in the Circuit Court, this Court has authoritatively settled the question thus presented (*United States* v. *Singer*, 15 Wall. 112), it will be unnecessary to give the proposition any further consideration here.

Defendants also offered certain letters (Record, p. 10), marked E, F, G, H, and I (Record, pp. 16, 17); and also offered to prove by the assessor that for the

first four days for which the taxes had been assessed against Clinkenbeard as distiller by said assessment, he was unable to operate his distillery, because no storekeeper had been assigned by the government; and also that for four other days, from the 8th to 12th day of October, said Clinkenbeard had, by reason of an unavoidable accident, been unable to operate said distillery; that proper and legal notice had been given of said accident and a desire to suspend, as required by law; that the machinery of said distillery during said time had been securely fastened by an assistant-assessor as provided by law, and so remained during said four days; and that the time which said machinery was so broken, and whilst the same was locked up by said assistant assessor, and whilst said distillery was not operated, but suspended in accordance with the revenue law, was included in the assessment so as aforesaid made.

To the introduction of said exhibits, and to the testimony so offered, the United States objected, which said objection was sustained by the Court, and thereupon defendants excepted in due form.

ASSIGNMENT OF ERRORS.

In our judgment the Court erred:

1. In rejecting the letter, offered by defendants. (Exhibits E, F, G, H, and I, Record, pp. 16, 17.)

2. In not permitting defendants below to show that for four days in October, a period of time included in the assessment, Clinkenbeard was unable to operate his distillery by reason of the neglect of the government to assign a storekeeper to his distillery.

3. In not permitting defendants below to show that from the 8th until the 12th day of October a period of time included in said assessment, and for which said Clinkenbeard had been assessed by reason thereof), Clinkenbeard had been unable to operate said distillery by reason of an unavoidable accident to machinery, of which he had notified the proper revenue officer, and complied with all the rules of the department in relation to such accidents and suspension by reason thereof.

ARGUMENT.

As the various errors which we have assigned, depend entirely upon the construction which the Court may give to the force, validity, and extent of an assessment made by an assessor of internal revenue, and its nature as a quasi judgment, from which there is no appeal, save as provided by the internal revenue law, we propose, for the sake of brevity, to consider them together.

As is apparent from the record, the government in the trial relied solely upon the assessment as being final and conclusive upon the defendants below, and the Court sustained this position, refusing to permit them to show that the same was erroneous in this, that capacity tax had been assessed against Clinkenbeard, the distiller, at a time when he could not operate his distillery by reason of neglect of the government to appoint a storekeeper, and again, because of an unavoidable accident to machinery, of which the revenue officers had notice as prescribed by law, and in pursuance to which they took possession and locked up the machinery of said distillery, and thus legally suspended the same.

The power to make the assessment in question was derived from the revenue law, approved July, 1868, the twentieth section of which provides.

. . . "In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller, or other person liable, shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies: but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits, than eighty per centum of the producing capacity of the distillery; as estimated under the provisions of this act."

Section 22d of the same act provides:

"That every distiller, at the hour of twelve meridian, on the third day after that on which his bond shall have been approved by the assessor, shall be deemed to have commenced and thereafter to be continuously engaged in the production of distilled spirits in his distillery, except in the intervals when he shall have suspended work as hereinafter authorized or provided. Any distiller desiring to suspend work in his distillery may give notice in writing to the assistant assessor of his division, stating when he will suspend work; and on the day mentioned in said notice said assistant assessor shall, at the expense of the distiller, proceed to fasten securely the door of

every furnace of every still or boiler in said distillery, by locks and otherwise, and shall adopt such other means as the Commissioner of Internal Revenue shall prescribe to prevent the lighting of any fire in such furnace or under such stills or boilers. The locks and seals, and other materials required for such purpose, shall be furnished to the assessor of the district by the Commissioner of Internal Revenue, to be duly accounted for by said assessor.

"Such notice by any distiller and the action taken by the assistant assessor, in pursuance thereof, shall be immediately reported to the assessor of the district, and by him transmitted to the Commissioner of Internal Revenue. No distiller, after having given such notice, shall, after the time stated therein, carry on the business of a distiller on said premises, until he shall have given another notice in writing to said assessor, stating the time when he will resnme work; and at the time so stated for resuming work, the assistant assessor shall attend at the distillery to remove said locks and other fastenings, and thereupon, and not before, work may be resumed in said distillery, which fact shall be immediately reported to the assessor of the district, and by him transmitted to the Commissioner of Internal Revenue.

"Any distiller, after the time fixed in said notice declaring his intention to suspend work, who shall carry on the business of a distiller on said premises, or shall have mash, wort, or beer in his distillery, or on any premises connected therewith, or who shall have in his possession or under his control any mash, wort, or beer, with intent to distill the same on said premises, shall incur the forfeitures and be subject to the same punish-

ment as provided for persons who carry on the business of a distiller without having paid the special tax."

Thus it will be see that, by the terms of the revenue law in force in October, 1868, express provisions, by providing for suspension, is made for accidents to machinery of a distillery, the method by which the proper officer shall be notified of the same, and the course, which the officer thus notified shall pursue.

Surely, it will not be claimed, in the face of such minute provisions of law as to the method to be observed in case of accident by the distiller and also the revenue officer, that it was the intention of the law, notwithstanding the casualty, to enforce the capacity and barrel tax during the time of such suspension; if so, wherefore the necessity of the law at all? If no benefits were intended to ensue to the distiller by giving the required notice, why provide a method for so doing? If he gave no notice, barrel and capacity tax could be assessed against him, and if he did give the notice, the same thing was to be done.

The proposition seems to us too absurd for further argument. It must be taken, that in case of suspension, duly notified to the proper officer, that the tax ceased until the distillery resumed operations.

And the same argument applies to the case of neg-

lect by government to assign a storekeeper to a distillery.

By the provisions of the regulations concerning the tax on distilled spirits under the act of July 20, 1868 (Series 5, No. 7), various things are required to be done in the establishment of warehouses, and it is further provided (p. 15, Series 5, No. 7):

". . . . and when approved by the commissioner, a storekeeper will be assigned to such warehouse. *Such warehouse must be established for each distillery before any spirits are distilled.* . . . ."

This prohibits any spirits from being distilled, until a warehouse shall have been established, and a storekeeper assigned.

Shall the government, in the case at bar, be permitted to profit from its own neglect?

It is admitted that the period covered by the assessment was the month of October, 1868. Was it not competent for defendants to show that during a portion of that month the distillery could not be operated by reason of the failure of the government to assign a storekeeper? Shall the government be permitted to say: "We won't assign you a storekeeper; you shall not distill any spirits, and yet you must pay capacity and barrel tax?"

See also Sect. 15 & 21 of the act of 18

We apprehend that no such inequitable rule will be enforced by any Court.

We presume that we shall be answered with the argument, which was strongly urged at the trial of the case at bar, and upon the strength of which the evidence offered by us was rejected, namely, that the assessment was conclusive and could not be inquired into; in other words, had the force and effect of a judgment at law for so much money.

This proposition needs careful consideration; for it is a declaration in effect that revenue officers officiate in a dual capacity—executive and judicial.

We have already shown from whence the power of assessment is derived. The assessment thus made can be reviewed by the Commissioner of Internal Revenue. Section 44 of the act of July, 1864, provides, and the same provision has been incorporated in all subsequent acts:

"That the Commissioner of Internal Revenue, subject to the regulations prescribed by the Secretary of the Treasury, shall be, and is hereby authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected; all penalties collected without authority, and all taxes that shall appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected. . . ."

Section 19 of the same act provides:

"That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a descision of said commissioner be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect. . . ."

These are the provisions of law upon which the claim is founded, that the assessment made against Clinkenbeard is final and conclusive; that as he took no appeal to the commissioner, he and his sureties on his bond as a distiller, are estopped from denying that there has been a breach, and that the amount of the same has been liquidated by the assessment.

What is the commissioner authorized to do? Simply to remit all taxes erroneously collected, or illegally assessed, when appealed to for that purpose.

What penalty is prescribed, and what right does the citizen forfeit by neglecting to take such appeal? *Only that of being barred from maintaining a suit to recover back the tax illegally or erroneously collected or assessed.*

In other words, if the government has succeeded in collecting the tax thus erroneously assessed or collected, a suit could not be maintained to recover the same, until an appeal should have first been taken to the commissioner. So, if the assessment in question *had been collected*, Clinkenbeard could not have maintained an action, upon the ground that the same was erroneous, until he had first appealed for relief to the commissioner. *Collector* v. *Hubbard*, 12 Wal. 1.

But how does this rule affect the case at bar?

Nothing has been collected upon the assessment, nor is the present, a suit against Clinkenbeard to recover the amount thereof; but it is an action upon a bond against a principal and sureties averring certain breaches of the same. What is there in the revenue law which prevents performance being shown as a perfect defense to the claim? Absolutely nothing.

It does seem that it would be a violation of all rules of justice and equity to deprive the defendants of their right to aver and prove performance of the conditions of their bond.

If they can show that which they offered to do, that the tax now sought to be collected, arose wholly during the time that Clinkenbeard's distillery was idle, because of the neglect to assign a storekeeper, and be-

cause of unavoidable accident, of which the notice was given to a proper officer, who placed the same in a state of legal suspension, and that the government has received every cent that it has a legal right to collect, certainly it would be unjust and inequitable not to permit them so to do.

Whilst we may admit, for the sake of the argument, that the assessment, as against Clinkenbeard, is conclusive, it by no means follows that his sureties are thereby barred from availing themselves of any defense which they might have, in a suit against them upon their bond.

Had Clinkenbeard been unlawfully and illegally assessed, and before the time limited by the revenue law to take an appeal to the commissioner become insane, and by reason of such insanity an appeal was not taken, could it be claimed that in a suit upon his bond as a distiller, his sureties would thereby be estopped from setting up the defense of performance?

It by no means follows that because the principal to a bond is estopped from setting up a specific defense that his sureties are also thereby precluded.

Sureties to a bond may maintain many defenses not available to their principal.

The proposition which we here maintain has been

passed upon by this Court in the case of *The United States* v. *Boyd et al.*, 5 Peters, 29, which was an action brought upon the official bond of Boyd as a receiver of public lands, and was against himself as principal, and others as his sureties.

Mr. Justice Nelson, in announcing the opinion, uses the following language:

"It has been contended that the returns of the receiver to the treasury deparment after the execution of the bond, which admits the money to be then in his hands, to the amount claimed, should be conclusive upon his sureties. We do not think so. *The accounts rendered the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties, but subject to explanation ana contradiction.* They are responsible for all public moneys which were in his hands at the date of the bond, or that may have come into them afterward, and not properly accounted for; *but not for moneys which the officer may chose falsely to admit in his hands in his accounts with the government.*

"*The sureties can not be concluded by a fabricated account of their principal with his creditors; they may always inquire into the truth and reality of the transactions existing between them.* The principle has been asserted by this Court in several cases."

The italics are our own.

In that case Boyd could, of course, have been estopped by his own admission, from denying the amount of

his indebtedness, if the suit had been against him alone; but not so with his sureties. They were permitted, notwithstanding the estoppel as against their principal, to show the exact state of Boyd's account.

So in the case at bar. As against Clinkenbeard, the assessment is final; but not so as against his sureties —they are not concluded, but may "always inquire into the truth and reality of the transaction."

Were it otherwise, sureties, without any fault of their own, and without a dollar being due the government, might be led to financial ruin by the mere neglect of their principal.

Suppose when Clinkenbeard had legally suspended "by reason of accident," he had not chosen to resume operations again for a year, and had left the country, and that the assessor had still continued to assess him, though not a gallon of spirits had been produced, and Clinkenbeard had no knowledge of the assessment by reason of his absence within the time limited to appeal to the commissioner, thus permitting an immense sum to be accumulated and assessed against him, would not the sureties, in a suit upon the bond, have had the right in their defense to show that nothing was actually due?

We maintain also that the assessment itself, so far as it includes capacity and barrel tax, whilst no storekeeper was assigned, and whilst the distillery was legally suspended, is absolutely void, and that plaintiffs in error were entitled to show the facts thus making it void, in their defense.

The theory of the revenue law of 1868 was that distillers should be obliged to pay these taxes *whilst in actual operation.* As we have shown before, by the law itself, it was provided that distillers might, by certain notifications, suspend operations; *in other words, cease to be distillers.* So also were they prohibited from operating their distilleries under severe penalties, until warehouses were duly established and storekeepers assigned.

The right which the assessor of the third collection district of Ohio had to assess Clinkenbeard, was by virtue of his being a distiller. This was the jurisdictional fact. The moment he ceased to be a distiller, either by his own act or by operation of law, that instant the province of the assessor to assess him ceased; his power was gone, and his assessment was a nullity.

Surely it would not be claimed that the mere assessment against one who had never been a distiller, would oblige the person so assessed to appeal to the

Commissioner for relief. He might well stand upon his legal rights, and treat the assessment as a nullity—as one might do the judgment of a court which had never acquired jurisdiction.

And if this be true as to one who never had been a distiller, why is not the same principle equally applicable to one who, for the time being, either by operation of law or at his own election, had ceased to be one?

If, therefore, the assessment was an absolute nullity, either in whole or in part, it certainly can not be successfully contended that the sureties had not the right to set up that fact in defense.

In conclusion, we submit, not only that gross injustice has been done plaintiffs in error upon the facts, but that the rulings of the Court below, as designated in our assignments of error, were erroneous, and we therefore ask that the judgment be reversed.

HOADLY & JOHNSON,

Of Counsel for Plaintiffs in Error.

CINCINNATI, *January* 2, 1874.

Robert Clarke & Co., Prs., 65 West Fourth St., Cin., O [*April*, 1874.

Supreme Court of the United States.

Elmore B. Clinkenbeard, Marmaduke Dodsworth, and Louis Sohngen,
Plaintiffs in Error,

vs.

The United States,
Defendant in Error.

Error to Circuit Court for the Southern District of Ohio.

Additional Brief for Plaintiffs in Error,
BY
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The affirmance of the judgment below by a divided Court having, on our application, been set aside and a rehearing of this cause granted, we desire to add a few considerations, which now occur to us, to those contained in our original brief filed herein.

It will be remembered that this was an action brought upon a distiller's bond, the breach averred being

that Clinkenbeard, the principal in said bond, had neglected to pay certain deficiencies in capacity and barrel tax; that at the trial below the United States offered in evidence an assessment made by an assessor of internal revenue for said capacity and barrel tax, and that plaintiffs in error offered to show that said assessment was erroneous, but that said testimony was rejected because no appeal having been taken therefrom to the Commissioner of Internal Revenue and suit instituted within the time limited by law, the same was held to be conclusive.

Was the Circuit Court right in thus excluding the testimony offered?

It must be borne in mind that this was not a suit against Clinkenbeard to recover the amount of the assessment thus made upon him, nor to recover the amount of tax and penalty, but was a suit against himself and his co-plaintiffs in error upon their certain writing obligatory, commonly called a distiller's bond, the non-payment of the assessment simply being averred as the breach thereof. The verdict shows (Record, p. 8) that the recovery was upon the bond and not upon the assessment.

Now, we maintain that the assessment was but an item of evidence, in this proceeding, which was not to recover upon it, but upon a collateral undertaking,

susceptible of explanation and correction as any other piece of testimony.

As we have before shown (original brief, p. 13), the Internal Revenue Law simply provides that unless an appeal shall be taken to the Commissioner, and within six months from the decision thereof, suit shall have been commenced, thereafter no action shall be maintained in any court for the recovery of any tax illegally or erroneously collected or assessed.

It must be remembered that this statute is in derogation of the common law: it deprives one who has thus illegally been compelled to pay that which he did not owe, of his remedy; it provides a new statute of limitation; in fact, is almost penal in its provisions—therefore it must be strictly construed.

What is its meaning? An examination of the Internal Revenue Law affords a complete solution of the question:

"No suit shall be *maintained* for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, ... unless brought within six months from the time of said decision."

The right to *maintain* a suit presupposes that the tax has been assessed and collected. This must be the true construction, because it is expressly provided as

follows (sec. 19 of Law of July 13, 1866; sec. 10 of Law of July 2, 1867): " . . . . . and no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

If, therefore, all courts are enjoined by the express provision of the Internal Revenue Law from entertaining any action brought to restrain either the assessment or collection of any tax, the only suit which can be *maintained* is that which may be brought within the specified time, to collect back, taxes erroneously and illegally assessed and collected.

And this must be so in the nature of things, for there is no provision of the Internal Revenue Law by which, on the taking of the appeal provided, to the Commissioner of Internal Revenue, the assessment complained of is either suspended or vacated. The collector of the district may go on, notwithstanding the appeal, and collect by distraint or otherwise; and the only remedy provided is, that a suit may be *maintained* to recover back the amount paid under the erroneous assessment, if the same shall have been brought within six months from the date of the decision of the Commissioner.

The provisions of the Internal Revenue Law are exceedingly stringent in the remedies provided by dis-

traint and otherwise for the collection of taxes assessed. (See sec. 1 of Law, March 3, 1865; secs. 9 and 11 of Law, July 13, 1866, and sec. 8 Law of March 2, 1867.)

These provisions can in no way be either avoided or suspended. However illegal, the tax which may be assessed, the courts of justice, both Federal and State, are closed against the unfortunate tax-payer *until he shall have first paid the illegal assessment*, and then he is graciously permitted within an exceedingly limited time to *maintain* a suit for its recovery—the theory being, undoubtedly, that the Government can not be deprived of its revenues by legislation, nor retarded thereby in their collection; that prompt payment is the rule, and then one who feels himself aggrieved may *maintain* his action to test his rights.

Whether, therefore, the statute by which suit may be *maintained* to recover back, taxes either erroneously assessed or collected, be construed strictly or otherwise, it can only be held to apply *to suits brought by the tax-payer* to recover taxes thus erroneously assessed or collected. The suit must be *maintained* by him, and it is exceedingly doubtful if the Government were to bring its action of debt, after the expiration of the statutory time of six months, against the citizen, whether he would be deprived, in such suit against him, of any plea that he might have against the sufficiency of the assessment.

Thus far we have considered the case as between the Government and the party assessed; but in the suit at bar new parties intervene, and parties who, by no principle of either law or equity, can or ought to be estopped by the assessment.

It is a familiar principle of law, that third persons, not parties to the record, can not be estopped thereby. The assessment in this case was against Clinkenbeard. He alone had the right to appeal — his sureties, Sohngen and Dodsworth, had neither notice of the assessment nor the right to appeal therefrom. Suppose they had appealed to the Commissioner, what answer would they have received? The assessment is not against you or either of you, nor does it affect your bond, as the Government has the right to collect it by distraint from Clinkenbeard, and he is not here complaining, but by his silence admits its correctness. Nor could they have appealed successfully to any Court for their protection, for as we have shown, by express and strict provision of law, the doors were barred against them.

We maintain that the assessment is conclusive against no one save Clinkenbeard, and only as against him in any suit which he might choose to institute against the Government, to recover taxes collected thereunder from him—certainly not in a collateral pro-

ceeding upon a written obligation brought by the Government against him and his sureties.

The construction which we seek to have given to this provision of the revenue law, is both just and equitable, whilst any other is harsh and technical. It certainly can work neither wrong nor occasion loss to the Government, whilst the rule sought to be enforced in the case at bar is not only productive of great hardship, but compels the citizen to pay that which he does not owe.

If the assessment is in fact erroneous, does the Government suffer any damage by the exposure of the error? It is surely not the province of the United States to oppress its citizens by the collection of that which is neither due nor owing; whilst, upon the other hand, if the assessment is correct, no loss can result from an examination into its merits.

No better illustration of the position here assumed by us, can be given than by an examination of the facts disclosed by the record in the case at bar; for if the judgment of the Court below is sustained, the Government will have judgment for, and collect an amount which is not now, nor never was due it.

Let us see:

The amended declaration (Record, p. 7), avers that the entire product, as estimated by capacity, of Clinken-

beard's distillery, for the month of October, being the period covered by the alleged deficiency for which the assessment was made, amounted to thirty-eight thousand nine hundred and one proof gallons; that there was a deficiency in that month of seven thousand nine hundred and twenty-seven gallons: or, in other words, said distillery should have produced, according to capacity, as fixed by the proper officer of internal revenue, thirty-eight thousand nine hundred and one proof gallons, but that only thirty thousand nine hundred and twenty-four gallons were actually manufactured, leaving a difference between production and capacity, as fixed for the purposes of internal revenue, of seven thousand nine hundred and twenty-seven gallons.

Assuming that the distillery was in operation every day, including Sundays, it should have produced, according to capacity, in round numbers, twelve hundred and fifty-four gallons of proof spirits daily.

The record also discloses (pp. 11 and 12), that plaintiffs in error offered to show at the trial of the cause in the Court below, that for eight days the distillery was not in operation, one-half of said time by reason of failure of Government to appoint a store-keeper, and the remaining half because of breakage in machinery, during which time its operations were legally suspended in ac-

cordance with the provisions of the internal revenue law.

Now, it will be seen that at the rate of twelve hundred and fifty-four gallons of proof spirits daily, in these eight days, ten thousand and thirty-two gallons of proof spirits would have been produced, *being three thousand and fifty-five gallons more than the alleged deficiency, and thus demonstrating that tax has already been paid on that number of gallons of spirits more than was actually manufactured.*

Not content with being overpaid, as we have thus shown, the Government is now seeking, by the enforcement of a harsh, technical, and inequitable rule, to recover for an alleged deficiency which we were prepared to show, if we had been permitted so to do, by its own officials, never existed. We apprehend that this nor no other Court, unless forced thereto, by express and inflexible rules of law, will sanction such an interpretation of the law in question.

The power already bestowed upon the assessor, and the *quasi* judicial effect given to his *ex parte* assessments, are sufficiently oppressive, without unnecessarily giving them greater scope and force.

As we have seen, whenever he has made an assessment, no matter how unjust, and irrespective of the testimony before him, nothing remains to the citizen, but payment. If unfortunately, as it often happens, he is

not able so to do, his property is taken from him by distraint, sold at half its value, and he is remitted to his only remedy—appeal to the Commissioner, who, if not a lawyer, is more apt to be wrong than right in his decision, and then follows the inevitable lawsuit, with its expense and delay.

Shall this injustice be extended—shall mere sureties, who have never had their day in Court, be included in its operations? We apprehend not.

We have argued at length in our original brief the relevancy of the testimony by which we proposed to show the erroneous character of the assessment in question, and the cause by which the seeming deficiency arose: *i. e.*, by breakage of machinery, and neglect of Government in failing to appoint a store-keeper.

Whilst we also referred therein to the regulations issued by the Commissioner of Internal Revenue rendering a store-keeper absolutely necessary in the conduct of a distillery, we neglected to cite the provisions of the Revenue Law itself upon that subject. We do so now. Secs. 15 and 21 Internal Revenue Law, approved July 20, 1868.

We have thus far presented our views based upon the theory that the defense which we proposed to make in the Court below, was perfect as to all the defendants.

But if this be not so, and this Court should be of the opinion that Clinkenbeard, the principal, is, by force of the assessment, barred from now setting up a defense thereto, we still claim that his co-plaintiffs in error, Sohngen and Dodsworth, are not thereby precluded from so doing.

This proposition we have discussed fully in our original brief, and we re-state it now, for the purpose of calling attention to an error in the statement of our position, contained in the argument of our learned opponents, and also that we may examine the case of *The United States* v. *Linn*, 1 How. 104, therein cited.

Counsel for defendant in error, in their brief (p. 2), use the following language:

"Supposing this was a mere capacity tax, the learned counsel admit that the assessment is final against the principal, because of his failing to appeal therefrom to the Commissioner; but they submit it is otherwise with the sureties."

We apprehend that our distinguished friends would find it exceedingly difficult, either in our original or in this additional brief, to find any such admission. What we did state, we now quote from our original brief (p. 15):

"Whilst we may admit *for the sake of the argument*, that the assessment against Clinkenbeard is conclusive, it by no means follows that his sureties are thereby barred from availing themselves of any defense which they might have, in a suit against them upon their bond."

Our claim is fully stated, when we say that the assessment made against Clinkenbeard, is neither final against him as principal, nor his co-plaintiffs as sureties, nor either of them, *in the present action.*

In considering the effect which now should be given to the decision of *The United States* v. *Linn*, supra, it should be borne in mind that it was pronounced nearly forty years ago, when a uniform system of practice and pleading prevailed in all the courts of the land, both Federal and State. Since which time, however, innovations—whether wise or otherwise, it is not now our province to discuss—have been the order of the day.

In Ohio, in the Circuit Court for the Southern District of which this case was originally tried, a code of practice entirely ignoring the common law rules of pleading, has been in force for more than twenty years, and the uniform tendency of all Congressional legislation has been to assimilate the practice in the Federal to that of the State courts, in all States where codes of procedure have been adopted.

To such an extent has this legislation been carried,

that it is no longer optional, save in certain specified proceedings, which course shall be pursued in the Federal courts as to pleadings; but it is provided that they *shall* conform in all things to the forms of practice adhered to in the State courts. (Act of June 1, 1872.)

Therefore, we say, the case of *The United States* v. *Linn* should be viewed, and the force which should now be given to it, determined in the light of the present order of things.

The plea in that case, had the facts therein stated been set up in the form of what is known as an answer in Ohio, and had the declaration been in the form of a petition, as it would now have to be, were a suit to be instituted to-day, upon the same causes of action therein set forth, in the Federal or State courts of Ohio, would have constituted a perfect defense for each, any, and all of the defendants, whether principal or sureties, who could have sustained the same by proof.

In other words, though several defendants, under the Ohio Civil Code of Procedure, may join in their answer, though, as to all, the facts may not sustain the defense, those who are able so to do, may take the benefit thereof, whilst judgment will go against those not so fortunate.

If, therefore, suit were now to be commenced in Ohio against plaintiffs in error upon the bond in ques-

tion, upon which this controversy has arisen, and they should choose to answer jointly, the plea would be perfect as to those who could sustain by facts their defense.

It is, perhaps, a fortunate circumstance that there are now upon the bench of this tribunal at least two who are perfectly familiar with the system of practice now in vogue in Ohio, and without any citation of authorities upon our part, will immediately recognize the truth of our proposition.

We therefore insist that the strict technical rule announced in *The United States* v. *Linn*, should be relaxed, and those of plaintiffs in error who are sureties, and who are not bound by the *quasi* judicial effect of the assessment, permitted to substantiate their defense, notwithstanding they may have inadvertently plead jointly with their principal.

Every equity is with plaintiffs in error. Nothing can be lost by the Government if the judgment in the case at bar is reversed; whilst, upon the other hand, if permitted to stand, they will be compelled to pay that not only which they do not owe, but which it would be the grossest injustice to compel them to pay.

HOADLY & JOHNSON,

Attorneys for Plaintiffs in Error.

CINCINNATI, *April* 20, 1874.